

SAYSON (Migration) [2018] AATA 2733 (29 June 2018)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Reynante Tojon Sayson
CASE NUMBER:	1703185
DIBP REFERENCE(S):	BCC2016/2367797 OSF2012/042542
MEMBER:	Maira Brophy
DATE:	29 June 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Statement made on 29 June 2018 at 1:20pm

CATCHWORDS

Migration – Partner (Migrant) (Class BC) visa – Subclass 100 (Spouse) – Disclosure of past relevant information – False and misleading information – Past relationship – Social media status – In a relationship while married to sponsor – Married to another woman – Sponsor’s health condition – Decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65

Migration Regulations 1994 (Cth), Schedule 2 cl 100.221, Schedule 4 PIC4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

4. ISSUE

5. The issue in the present case is whether the first named visa applicant, Mr Reynante Tojon Sayson meets Public Interest Criterion 4020 (PIC 4020) as required by cl.100.221(2)(b) of Schedule 2 to the Migration Regulations 1994 (the Regulations) for the grant of the visa.

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 2 February 2017 to refuse to grant the applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
7. The applicant applied for the visa on 13 December 2012. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.100.221(2)(b) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because relevant information about a past relationship had not been disclosed.
8. The applicant, Mr Reynante Tojon Sayson appeared before the Tribunal on 4 June 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Ms Licinia Green. The Tribunal hearing was conducted with the assistance of an interpreter in the Tagalog and English languages.
9. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

11. BACKGROUND

12. Mr Sayson is a 51-year-old who was born in the Philippines. He lodged an application for a Partner (Provisional)(Class UF)(Subclass 309) visa on 13 December 2012 on the grounds of being in a spousal relationship with an Australian citizen Liciana Green. His 309 visa was granted and he arrived in Australia on 11 July 2013. He has declared no previous relationships. Mr Sayson's father is deceased, his mother, one sister and one brother reside in Australia.
13. Ms Licinia Green is a 70-year-old born in the Philippines but now living in Australia. She was previously married in the period from 1967 to 1999. There were six children of the marriage, two living in the Philippines, one in Saudi Arabia and three in Australia. She was then married in the period from 2000 to 2005. She was sponsored to Australia by her second husband. She became an Australian citizen on 26 January 2005. Her parents and two brothers are deceased. She has two sisters in the Philippines.
14. The parties stated that they met in December 2007 and began a relationship on 25 December 2010. They committed to the relationship to the exclusion of all others in March 2011. They were married on 27 November 2011.
15. On 18 July 2016 the Department wrote to Mr Sayson requesting documentation for consideration of his Subclass 100 (Partner(Migrant)) visa.

16. On 2 August 2016 a response was received including statutory declarations from both the sponsor and the visa applicant.
17. On 19 August 2016 the Department wrote to Mr Sayson to invite him to comment on adverse information, in particular that the information he provided on 2 August 2016 that he and the sponsor continued to be in a genuine and continuing relationship that was mutually exclusive, was fraudulent. The letter stated that on material posted on Facebook suggested Mr Sayson was married to Marilou Delossantos, and that they had married on 28 December 2012.
18. Mr Sayson responded on 17 October 2016 in the form of a signed statement from him and the sponsor, a signed statement from Marilou Delossantos, two statements from the Civil Registrar General in the Philippines, a report from the City Civil Registry Office and a letter from the Archdiocese of Ligayen-Dagupan in the Philippines.
19. In the Decision Record, a copy of which Mr Sayson's migration agent has provided to the Tribunal, the delegate acknowledged Mr Sayson's response to the adverse information outlined above. The delegate considered the evidence presented and was satisfied the applicant had provided false and misleading information, but was not satisfied that compelling circumstances exist to warrant a waiver. Consequently, the delegate was not satisfied that the applicant met the waiver requirements of PIC 4020(4).
20. The Tribunal extended time after the hearing for the applicant to provide any additional material he wished to rely on in response to matters raised at the hearing. A further submission was received on 20 June 2018 and has been considered by the Tribunal in the decision making.

CONSIDERATION OF CLAIMS AND EVIDENCE

21. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.100.221(2)(b) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

22. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

23. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
24. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
25. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
26. The Tribunal is satisfied that the applicant provided information with his application that may be considered to be false and misleading. In making this finding the Tribunal has considered the materials contained in the department file including the excerpts from Facebook.
27. At the time of hearing Mr Sayson said he and Ms Marilou Delossantos had held a marriage ceremony in the Philippines on 28 December 2012, but he said it had not been a genuine marriage. The purpose of the marriage ceremony had been to appease her parents. His submission was that it was not a registered union and should therefore not be considered a valid marriage. He relied on the documentation provided that there was no official record of the marriage.
28. When put to Mr Sayson that his Facebook status was indicative of his having married Ms Delossantos, he said he had not been responsible for the change in his relationship status as recorded on Facebook. He said it must have been changed by his friends and he was unable to advise if his status could be updated by a person other than himself.
29. When further pressed about whether he and Ms Delossantos had ever been involved in a relationship he said they had a 'sexual dalliance' in 1998-1999. When asked why he had not declared that at the time of his application for a Partner visa he said he did not consider it to be a relationship requiring declaration. He said he had not been on speaking terms with Ms Delossantos at the time of his Partner visa application. When put to him that was not a reason for failing to declare, Mr Sayson said he had 'forgot' to declare his relationship with Ms Delossantos.
30. It was put to Mr Sayson that his Departmental Movement Records were indicative of he and Ms Delossantos travelling overseas together in 2014. Mr Sayson said he and Ms Delossantos had travelled together for a holiday in 2014. They travelled as friends and did

not stay together as a couple. He said they had holidayed at the time of the festival in the Philippines.

31. Mr Sayson was asked as to what his relationship with Ms Delossantos had been in the period since 1998-1999. He said from that time they had only been friends. It was put to him that information was not consistent with the information he provided to the Department on 17 October 2016 that he did in fact have a relationship with Ms Delossantos after he was married to Ms Green. Mr Sayson told the Tribunal he had been “confused during this period.”
32. The Tribunal did not find the evidence given by Mr Sayson in response to concerns raised by the Tribunal to be convincing and does not consider that the discrepancies and contradictions in the evidence have been adequately explained. The elaborate version of events provided to explain the discrepancies, including that there was a marriage ceremony held with Ms Delossantos to appease her parents, and for no other reason, was unpersuasive and the Tribunal considers it has been invented in an attempt to explain the discrepancies and contradictions in the evidence.
33. The Tribunal is satisfied that Mr Sayson provided information that was false or misleading in a material particular on his visa application lodged on 13 December 2012.
34. Since the Tribunal is satisfied the information provided is ‘false and misleading in a material particular’ the Tribunal finds the applicant does not meet cl.4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

35. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
36. The expressions ‘compelling circumstances’ and ‘compassionate or compelling circumstances’ are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of ‘compassionate’ relates to feelings of sympathy, sorrow, pity or concern for others.
37. The Explanatory Statement states that it is intended that the granting of the waiver relates solely to compelling circumstances affecting Australia’s interests, or the compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, not the interests of the visa applicant. The types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 include:
 - Family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
 - That family members in Australia would be left without financial or emotional support; and

- A parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period).
38. The Tribunal is required to consider all the circumstances of the case including any matters put forward by an applicant, and determine on the evidence as a whole whether there are compelling and/or compassionate circumstances justifying the granting of the visa.
 39. The parties have not made any submissions or claims that there are compelling circumstances that affect the interests of Australia in this matter. The submissions by Mr Sayson to the Tribunal relate to compelling or compassionate circumstances that affect Ms Green, who is an Australian citizen.
 40. Mr Sayson submitted that the parties are in a genuine and continuing spousal relationship and separation would therefore cause them emotional hardship. Mr Sayson said the health of Ms Green was not good. She was quite frail when walking and she has painful feet. She sees her doctor regularly and takes medication. A Health Summary Sheet for Ms Green provided after the hearing indicated she had the diagnosed medical conditions of dyslipidaemia, hypertension, Type 11 diabetes, gastro oesophageal reflux and osteoarthritis. Ms Green told the Tribunal that her medical conditions were controlled with the medication she takes.
 41. Mr Sayson spoke of his concerns for his wife, and his need and her family's expectation he provide her with support especially given her daughter's unstable mental health. The Tribunal is not persuaded that providing emotional care and support is dependent upon living in the same household. It is open to the parties to continue to provide psychological support to another by the various electronic communication methods available while they are apart.
 42. After considering all of the evidence before it the Tribunal is not satisfied that there are any circumstances in this case that affect an Australian citizen, Australian permanent resident or eligible New Zealand citizen, either on an individual or cumulative basis, that are of a compelling or compassionate nature that justify the waiver of PIC 4020 and the grant of a Subclass 100 visa to the applicant.
 43. Therefore the requirements of cl.4020(1) should not be waived.

DECISION

44. The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Moira Brophy
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...